No. 164.

Brief of Bunn for

Office Supreme Court U. S.
FILED
JAN 18 1899
JAMES H. MCKENNEY
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 164.

Filed Jan. 18, 1899.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

JAMES DE LACEY.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN,
JAMES B. KERR,
Counsel for Plaintiff in Error.

PIONEER PRESS CO., ST. PAUL, MINN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 154.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

JAMES DE LACEY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the circuit court of appeals for the Ninth Circuit, brought to review a judgment of that court affirming a judgment of the circuit court for the District of Washington, rendered in favor of James De Lacey, dismissing an action brought against him by the Northern Pacific Railroad Company, the predecessor of the plaintiff in error.

The action was ejectment, brought by the Northern Pacific Railroad Company in the circuit court, to recover possession of the southwest

quarter of the northeast quarter, the southeast quarter of the northwest quarter, and the east half of the southwest quarter of section 21, township 20 north, range 3 east of Willamette meridian, Pierce county, Washington.

The action was tried before the court, a jury being waived, and upon the findings of the court, judgment was entered in favor of the plaintiff. The defendant, James De Lacey, thereupon sued out a writ of error in the circuit court of appeals for the Ninth Circuit to review this judgment. That court reversed the judgment of the circuit court and remanded the case for further proceedings not inconsistent with its opinion. The circuit court refused to grant a new trial, and judgment was entered upon the findings, dismissing the plaintiff's complaint. To review this judgment the plaintiff sued out a writ of error in the circuit court of appeals, and judgment was thereafter entered affirming the judgment of the circuit court. It is to review this judgment that the writ of error is brought.

The action was commenced by the Northern Pacific Railroad Company, but by order of court the receivers of that company were afterward made parties. (Transcript, p. 26.) Subsequently, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, and the receivers, was substituted as plaintiff. (Transcript, p. 56.)

The complaint alleges that the plaintiff is the owner and entitled to the possession of the land in controversy, and that the defendant has wrongfully entered thereon and withholds the possession. (Transcript, p. 1.)

The answer admits the possession of the premises by the defendant, but denies that plaintiff is the owner. The answer further contains what is denominated an "affirmative defense" wherein it is alleged that the plaintiff claims title to land in controversy under the act of congress of July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad from Lake Superior to Puget's Sound. The answer alleges that the land in question was excepted from this grant, and that in 1886 the defendant, qualified to enter land under the homestead law, settled thereon and made application to enter the same as a homestead, but that his application was rejected because of conflict with the grant to the Northern Pacific Railroad Company.

It is alleged further that in the year 1892, a patent for the land was issued to the Northern Pacific Railroad Company, but that the same was unlawfully issued. The answer concludes with a prayer for judg-

ment that the patent be cancelled, that the plaintiff take nothing by the suit, and that it be adjudged that the defendant is lawfully in possession of the premises. (Transcript, 20-24.)

To the affirmative defense contained in the answer the plaintiff interposed a demurrer. (Transcript, 25.) This demurrer was overruled and an exception allowed. (Transcript, 26.)

Upon the trial the following facts were found by the court:

By act approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line, from Lake Superior to Puget's Sound on the Pacific Coast, by the Northern route," congress granted to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * * and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." (Finding I, Transcript, 36.)

On March 26, 1884, the Northern Pacific Railroad Company filed in the office of the commissioner of the general land office its map of definite locotion of that portion of its branch line, extending from Tacoma to South Prairie. The land in controversy is within twenty miles of this line of definite location. (Finding X, Transcript, 39.)

The road opposite the land was duly constructed and accepted by the president upon the report of commissioners appointed to examine the same. (Finding XI, Transcript, 39.)

April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase the land in controversy under the laws of the United States, authorizing the pre-emption of unoffered lands. (Finding XII, Transcript, 40.)

In the fall of 1869, Flett left the land in controversy, and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the Railroad Company, De Lacy, Flett and others, involving the land in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim, that they told him it was railroad land, and that he has lost it; that Flett did not actually offer to make proof, but acquiesced in the advice of the local officers that he was not entitled to make proof under his filing. (Finding XIII, Transcript, 40.)

The defendant, James De Lacey, settled upon the land in April, 1886. April 5, 1886, he applied to make homestead entry. His application was rejected for conflict with the Northern Pacific grant. From this decision by the register and receiver, De Lacy appealed to the commissioner of the general land office. (Finding XV, Transcript, 40.)

September 7, 1887, John Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement, filed April 9, 1869. (Finding XVI, Transcript, 40.)

Afterwards under the instructions of the commissioner of the general land office, a hearing was had before the district land office, at which all parties were represented. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the commissioner of the gen eral land office, and on December 5, 1889, that officer sustained the finding of the receiver. Thereafter, the other parties appealed to the secretary of the interior, and on September 28, 1891, the secretary reversed the ruling of the commissioner and awarded the land in controversy to the Northern Pacific Railroad Company. December 13, 1892, letters patent of the United States, regular in form, were issued conveying the land to the railroad company. (Finding XVII, Transcript, 40.)

Flett's declaratory statement was not formally canceled upon the records until December 23, 1891. (Finding XIX, Transcript, 41.)

ASSIGNMENT OF ERRORS.

The errors are duly assigned. (Transcript, pp. 64, 65, 66.)

ARGUMENT.

From the foregoing statement it appears that the land in question is situated within the primary limits of the grant by act of congress of July 2, 1864, in aid of the branch line of the Northern Pacific Railroad over the Cascade mountains, as defined by the map of definite location filed March 26, 1884. Under the act of 1864, the Cascade branch was part of the main line from Lake Superior to Puget's Sound, but by the joint resolution of May 31, 1870, this line was designated as the branch and the former branch, authorized under the act of 1864, was designated as the main line, and the company authorized to extend the same via the valley of the Columbia river to Puget's Sound.

U. S. vs. N. P. R. R. Co., 152 *U. S.*, 284.

It appears from the record that the land in question is also situated within the primary limits of the grant for the extended main line, located between Portland and Tacoma, under the joint resolution of May 31, 1870, but the rights of the company under the act of July 2, 1864, being prior, this fact may be disregarded.

The question upon which this case was decided, in both the trial court and in the circuit court of appeals, was whether the pre-emption declaratory statement of Flett, filed April 9, 1869, constituted such a claim to the land at the time of the filing of the map of definite location, March 26, 1884, as excepted it from the grant to the railroad company.

Section 2267 of the Revised Statutes was adopted July 14, 1870, and amended March 3, 1871. The pre-emption law relating to *unoffered* land had contained before that date no similar provision. That section is as follows:

"All claimants of pre-emption rights under the two preceding sections shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notices has expired."

This section was applicable to the Flett filing.

The circuit court, in an opinion by Judge Gilbert, held that the claim of Flett was extinguished by abandonment before the filing of the map of definite location by operation of law. The court said:

"The material fact in this case is that at the time the line was definitely located the claim of Flett no longer attached, but had been extinguished. It is immaterial whether it was extinguished by a proceeding in the land office resulting in a cancellation of the entry, or by the voluntary action of the claimant amending his entry and releasing the lands, as in the Amacker case, or by the abandonment and forfeiture of the claim, as in the case now under consideration. The defendant relies upon the fact that the Flett entry remained uncancelled until 1891. A declaratory pre-emption statement, on file prior to and at the time the grant was made, would be proof of the intention of congress to exclude from the grant the land covered thereby; and such an entry in the files of the land office, made after the date of the grant, and remaining in existence at the time of the definite location, so as to furnish evidence of a claim that might ripen into a title by compliance with the land laws, would likewise serve to exclude the land from the grant, for it was not the intention of the grant, as construed by the decisions, to permit an inquiry into the *bona fides* of such a claim, or the performance of the conditions which rested upon the elaimant. But here it is not only admitted by both parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the

land is predicated upon such abandonment by Flett, and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office. The court will not regard the existence of an entry the life of which is admitted to have expired, but must be guided by the admitted facts. It must be held, therefore, that the land in controversy was public land, subject to the grant in 1864 and free from any claim that would exempt it therefrom in 1884, when the line of the road was definitely located." (Transcript, 33.)

The circuit court of appeals held, however, that it was immaterial that Flett had abandoned the land and all rights under his filing had become extinguished by lapse of time. The conclusion was reached that because the filing had never been formally cancelled of record when the map of definite location was filed, it constituted such a claim to the land as excepted it from the grant, and this conclusion was reached under the decision of this court in *Whitney vs. Taylor*, 158 *U. S.*, 85.

De Lacey vs. Northern Pacific Railroad Co., 44 *U. S. Appeals*, 257, 270; 72 *Fed. Rep.*, 726, 732.

Section 2267, prescribing the time within which proof and payment must be made under the pre-emption law for *unoffered* land was not in force when the facts arose which were involved in *Whitney vs. Taylor*.

The question is presented, therefore, whether an expired pre-emption declaratory statement will except land from a railroad grant.

As will be shown, prior to the decision in *Whitney vs. Taylor*, it had been the settled practice of the interior department for more than fifty years to treat as of no force or effect declaratory statements under which proof and payment had not been made within the time fixed by statute.

The case of *Whitney vs. Taylor* was this:

One Jones had filed, on May 22, 1857, a pre-emption declaratory statement. The Central Pacific Railroad Company filed a map of definite location March 26, 1864; at that time there existed no limitation as to the time within which a pre-emptor should prove up and pay for his claim, except that it should be done before the land might be offered at public sale by proclamation of the president. The tract in dispute had not been so offered at the date of the definite location of the road and indeed had never been offered since. The ruling was that Jones' time to make proof and payment had not expired, and consequently his was an existing filing of record at the date of the definite location of the road. It was a claim which Jones could at

that time legally prove, and make title under. Mr. Justice Brewer, in the opinion, page 97, is careful to state that the land in controversy was not offered for public sale, being expressly excepted and excluded from such sale as mineral land. Quoting from Secretary Noble's decision, Mr. Justice Brewer says:

"It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The pre-emption act of March 3, 1843, provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached and it so continued until modified by the act of July 14, 1870."

The inference is plain and irresistible, that had the land in controversy been offered for public sale by proclamation of the president, without Jones having proved up and paid, his filing would have thereby lapsed and expired by limitation and the land would have been subject to the grant.

It is submitted that it was not the intention of this court in deciding *Whitney vs. Taylor* to overthrow the long settled construction of the interior department upon this question. As has been said many times, the uniform practice of the department is strong evidence of the proper construction of the law and should not be overturned without cogent reason.

An examination of the pre-emption law is necessary both for the purpose of ascertaining the construction placed upon it by the department and of determining the nature of the pre-emptive right.

The first general pre-emption law, that of September 4, 1841 (5 Stat., 453), authorized settlement and entry upon proof and payment, on all public lands to which the Indian title had been extinguished, but provided for filing a declaratory statement only on lands subject at the time to private entry or "offered" lands. The settlement under this act on unoffered lands protected the settler until the land was offered at public sale.

Whitney vs. Taylor, supra.

The declaratory statement filed by a settler on offered land gave him a preferred right of purchase for twelve months from the date of his settlement.

In case the settler on offered land failed to make proof and payment within the twelve months prescribed, the land became "subject to the entry of any other purchaser."

Johnson vs. Towsley, 13 *Wall.*, 72.

The right of purchasing the land in preference to others, during the period limited by law, is the right of pre-emption.

Myers vs. Croft, 13 *Wall.*, 291.

"The right then to hold the land before payment is made therefor, upon promising to buy the same at a stipulated time, together with the right to purchase at such time, is the 'pre-emptive right.'"

J B. Raymond, 2 *Land Decisions*, 854.

Upon the failure of the settler upon *offered* land to make proof and payment within the twelve months prescribed by law, all rights in him, as a *pre-emptor*, expired. During that period the function of the declaratory statement was to protect the preferred right of purchase. When the twelve months expired the declaratory statement was *functus officio*, and thereafter conferred no rights whatsoever. Any applicant to purchase the land at private sale would take it and without notice of any kind to the settler. This was the construction of the interior department, from the beginning, as appears by the case of *J. B. Raymond, supra.*

Furthermore, the department held, as shown by the circular of September 28, 1842 (1 *Lester's Land Laws*, 369), cited in the Raymond case, that the failure on the part of the settler to make proof and payment, was sufficient to debar him from the privilege of making a private entry of the land upon which he had settled. This holding of the department, coming to the attention of congress, it was provided by act of March 3, 1843 (5 *Stat.* 619), in section 9 thereof, as follows:

"And said act (Act of September 4, 1841, *supra*) shall not be so construed as to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption under said act, from the right allowed by law to others to purchase the same by private entry *after the expiration of the right of pre-emption.*"

Thus it appears both by departmental construction and enactment of congress that upon the expiration of the twelve months within which a settler on offered lands was required to make proof and payment, the right of pre-emption expired and the settler was relegated to the class of citizens of the United States generally in whom there existed merely the right to purchase the land at private entry. All claim

on the part of the settler as a pre-emptor, and under the pre-emption law, ceased. His relation to the land thereafter was identical with that of any other citizen of the United States, there remaining in him no right with reference to the land, except the right which all other citizens enjoyed, to purchase it at private sale at $1.25 per acre.

The pre-emption act of March 3, 1843 (5 *Stat.* 619), for the first time provided for the filing of a declaratory statement on unoffered lands, or lands not proclaimed for sale.

Johnson vs. Towsley, supra.

Section 5 of that act provided:

"That claimants under the late pre-emption law, for land not yet proclaimed for sale, are required to make known their claims, in writing to the register of the proper land office, within three months from the date of this act when the settlement has been already made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited, and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law."

Instructions under this act were issued May 8, 1843 (1 *Lester* 370, 374), and on March 10, 1869 (2 *Lester*, 237, 241), declaring that the settler on unoffered lands might make proof and payment at any time prior to the commencement of the public sales.

The pre-emption law remained unchanged until the passage of the act of July 14, 1870. (15 *Stat.*, 279.)

Malone vs. U. P. R. R. Co., 7 *Land Decisions*, 13.

By section 2 of said act of July 14, 1870, it was enacted that:

"* * * All claimants of pre emption rights shall, hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired; provided, that where said date shall have elapsed before the passage of this act, said pre-emptors shall have one year after the passage hereof in which to make such proof and payment."

Instructions were issued under this act by the interior department on July 30, 1870 (*Copp's Public Land Laws*, 1875, 291), and December 30, 1870. (*Ibid*, 306.)

By the former it was declared:

"The settler on surveyed 'unoffered land' must file his or her declaratory statement within three months from the date of his or her settlement on such land, and within eighteen months from the expiration of said three months, make the proper proof and pay for such land. Where settlers had already filed before the passage of the act, they are required to make proof and payment within one year from such passage, therefore all filings made prior to that date will expire, *by limitation of law*, upon unoffered lands on the 14th day of July, 1871."

The instructions of December 30, 1870, were:

"6th. You will treat all filings upon lands which have once been 'offered' as abandoned after the lapse of twelve months from the alleged settlement, which is the statutory limitation, and all filings upon 'unoffered' lands as *abandoned* after the lapse of twenty-one months after such alleged settlement or the filing of the township plats, unless within the period fixed by law proof and payment shall have been made, or legal tender of such proof and payment shall have been made and refused."

On March 3, 1871 (16 *Stat.*, 601), a joint resolution was passed providing:

"That settlers on the public lands of the United States who have been required to make proof and payment for their lands under the act to extend the provisions of the pre-emption laws to the territory of Colorado, and for other purposes, approved July 14, 1870, and by instructions from the general land office, under date of July 30, 1870, shall have twelve months' additional time given them under which to make such proof and payment."

Thereupon, on May 5, 1871 (*Copp's Public Land Laws*, 1875, 308), instructions were issued under said act as follows:

"The settler on surveyed 'unoffered land' must file his or her declaratory statement within three months from the date of his or her settlement on such land, and within thirty months from the expiration of said three months, make the proper proof and pay for such land. Where settlers had already filed before the passage of the act, they are required to make proof and payment within two years from such passage; therefore, all filings made prior to that date will expire *by limitation of law* upon unoffered lands on the 14th July, 1872."

The limit of eighteen months fixed by the act of 1870, and the extension of twelve months by the resolution of 1871 together make up the thirty months from the time prescribed for filing on unoffered lands, within which the settler on such land was required by section 2267 Revised Statutes to make proof and payment.

It is apparent from the facts in this case that the filing of Flett here in question, made April 9, 1869, expired long prior to the attachment of the company's grant. From that time the filing evidenced no right of any character based upon the pre-emption law. Nor has the statute intervened to give the settler on unoffered land any other or further right than the pre-emption law itself gave him.

The provisions of section 2272, Revised Statutes, are necessarily confined to settlers on unoffered lands. That section provides:

"Nothing in the provisions of this chapter shall be construed to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption, from the right allowed by law to others to purchase such tract by private entry after the expiration of the right of pre emption."

Inasmuch as unoffered lands are not subject to private entry, this section can have no reference to them, as there is no "right allowed by law to others to purchase such tract by private entry," and no such right is extended by this section to the settler on such lands.

The history of the enactment of section 2272, Revised Statutes, has been pointed out above, it appearing that the provision was originally appended to the pre-emption law of March 3, 1843, and referred solely to the right of pre-emption on offered lands conferred by the pre-emption law of September 4, 1841.

And before the decision in Whitney vs. Taylor, the rulings of the interior department were uniform that an expired pre-emption declaratory statement constituted no such claim as would except land from a railroad grant, although since that decision the department has to some extent changed its rulings in this regard.

The effect of expired declaratory statements was considered by the interior department in Railroad Company vs. Stovenour, 10 Land Decisions, 645. After argument, orally and by printed brief, and careful consideration, it was decided first, that a filing of record unexpired at the date of withdrawal on general route, excepts the land from such withdrawal, and also if unexpired at the date of definite location, it excepts the land from the grant; second, if, however, at either of these points of time, the filing had expired by statute, without the required proof and payment having been made, the presumption arises that any claim which had attached under such filing has been abandoned, and that the claim no longer exists.

To the same effect, among others, are the following decisions by the department:

Railroad Company vs. Moling, 11 *L. D.* 138;
Railroad Company vs. Kranick, 12 *L. D.* 384;
Kricklan vs. Railroad Company, 13 *L. D.* 22;
Railroad Company vs. Railroad Company, 13 *L. D.* 559;
St. Paul & Pacific R. R. Co., 13 *L. D.* 637.

The fact that declaratory statements, expired under the statute, were allowed to remain of record in no manner affects the question. It has not been the practice of the department to cancel such filings, but they have uniformly been treated as extinguished by operation of law.

Instructions of December 30, 1870, *supra.*

In circular of September 8, 1873, Commissioner Drummond said:

"By the operation of law limiting the period within which proof and payment must be made in pre-emption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry. These expired filings are classed with those actually abandoned or relinquished."

1 *Copp's Land Owner*, 29.

In circular of November 8, 1879, it was said:

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

6 *Copp's Land Owner*, 142.

January 13, 1885, the secretary of the interior said:

"An 'expired pre-emption filing' is no bar to receipt of an application for public lands, nor for suspension of an entry and is never considered as a bar to issue of patent. Nor is it the practice to enter formal cancellation of such filings upon the books, nor take any action concerning them; they are simply treated as abandoned claims."

State of Alabama, 3 *L. D.* 317.

Perhaps the clearest evidence of the construction placed by the department upon the pre-emption right and the light in which such claims

were regarded, is found in the fact that the local land officers were instructed when a declaratory statement was filed to note the same *in pencil* upon the tract books of their office.

Circular, September 15, 1841, 1 *Lester*, 360, 363;
Circular, May 8, 1843, 1 *Lester*, 370, 371.

And these instructions have never been modified. Such a record was sufficient to protect the rights of the settler during the period prescribed by the law, but by no means such a record as could properly be resorted to for the purpose of determining rights after the lapse of a quarter of a century.

And it is submitted that the proposition that an expired pre-emption claim will except land from a railroad grant finds a conclusive answer in the simple statement. The right of pre-emption, as the word implies, is the right to buy before another. It is the privilege which the possessor of the right enjoys and which no one else possesses, and of which no one can deprive him.

When the period fixed by the statute expired, however, the claimant had no right whatsoever which he would not have had if he had never gone through the formality of declaring his intention. His rights were those of any other citizen and any other citizen could have acquired the land in the same way and by the same means as would have been required if the declaratory statement had never been filed.

The law looks to the substance and not to the form. If the filing evidences a right vested or inchoate it should defeat the grant, but where it evidences no right, when all privileges which it conferred have by the lapse of time been withdrawn, and the man who made it stands in relation to the land in the same position as every other, there is nothing upon which to base the conclusion that the land is subject to a pre-emption claim.

In *Keane vs. Brygger*, 160 *U. S.*, 278, it appeared that the territory of Washington had selected for university purposes, under the act of congress, a tract of land which had theretofore been entered as a homestead. Before the selection, however, a relinquishment of the homestead entry had been filed but the entry had not been formally canceled of record. It was contended that the mere fact that the entry remained of record was sufficient to defeat the selection. This court observed that it was the policy of the law to protect the rights of a homestead claimant, but that where the right was in fact extinguished by the filing of a relinquishment, the selec-

tion could not be affected by the fact that the officers had failed to note the cancellation on the records.

The case at bar is entirely dissimilar to *Whitney vs. Taylor*, upon which the circuit court of appeals based its decision. That case, far from sustaining an exception from the company's grant of the land in question, is plain authority that the land is included in the grant. Mr. Justice Brewer, in *Whitney vs. Taylor*, states the rule in this language:

"The principle to be deduced from them (the decisions of this court) is, that when on the records of the local land office there is an *existing* claim on the part of an individual under the homestead or pre-emption law, *which has been recognized by the officers of the government*, and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses."

Declaratory statements, like that of Flett, since the passage of the act of 1870, after they are thirty months old, show on their face at a glance that they have expired and that they are no longer existing. Such a filing may not even appear canceled on the books of the land office, but it has been set aside by process of law. By the force of the statute it has ceased to exist and no formal cancellation of it is necessary, or has ever been held by this court to be necessary, to re move it from the record. The court used the words in the quotation above made from Mr. Justice Brewer's opinion "canceled, or *set aside*," with a purpose. The terms are not convertible. They evidently include both formal cancellation on the books and any other method for putting an end to a claim, including, we submit, surrender or abandonment by the pre-emptor, or what is tantamount to the same thing, failure to take any steps under the declaratory statement for more than thirty months.

The purpose of the exception, contained in the Northern Pacific and other railroad grants, of lands subject to pre-emption or other claims, as was said by this court in *Kansas Pacific R. Co. vs. Dunmeyer*, 113 *U. S.* 629, was to guard against the danger of placing the parties, the railroad company on the one hand and the pre-emption claimants on the other, as contestants for the land with the right in each to require proof from the other of the performance of its obligation. But where by the expiration of the right of pre-emption the claimant no longer enjoys any privileges in respect to the land which are not enjoyed equally by every other citizen, the record evidences no claim which can be the subject of a contest, and to hold that the land is included within the terms of the grant can no more render the

railroad company the contestant and antagonist of the man who made the filing than of every other whose rights in the land are the same as his.

II.

Furthermore, it appears from the record in this case that on December 13, 1892, the patent of the United States was issued to the Northern Pacific Railroad Company, conveying the land in controversy. And this patent was issued after a contest between the railroad company, the defendant James De Lacey, and John Flett, in which a decision was rendered by the secretary of the interior on September 28, 1891, awarding the land to the railroad company. (Finding XVII, Transcript p. 40.)

It is submitted that, although it should be held that the Flett filing, remaining uncanceled when the company filed its map of definite location, was *prima facie* sufficient to except the land from the grant, yet the presumption arising from the issuance of the patent must defeat this claim. The patent, issued as it was after a contest in the department, declares the judgment of the officers that the land was public land, free from claims and rights at the date of the grant, and at the date of definite location, and was subject to and passed under the grant. Every presumption is in favor of the patent, and if under any possible circumstances consistent with the established facts, the patent could have been rightfully issued, it will be sustained.

"The doctrine as to the regularity and validity of its (the land department's) acts where it has jursidiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

Smelting Co. vs. Kemp, 104 *U. S.*, 636, 646.

"The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

United States vs. Iron Silver Mining Co., 128 *U. S.*, 673, 676.

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

U. S. vs. Marshall Mining Co., 129 *U. S.*, 579, 589.

And the justice of the rule laid down by these decisions is well illustrated by the case at bar. Facts consistent with the facts established not only could exist, but did exist, which rendered the issuance of the patent to the railroad company proper. It appears by the decision of the secretary of the interior, rendered November 28, 1891, in the contest referred to in Finding XVII (Transcript, p. 50), that on February 20, 1874, Flett made homestead entry of a tract of land other than that in controversy, and on June 9, 1880, made final proof therefor and received a final certificate. This decision by the secretary is not set out at length in the findings, but is reported under the title *Northern Pacific Railroad Company vs. Flett*, 13 *L. D.*, 617.

This decision and the fact there found are not referred to for the purpose of establishing the fact, but for the purpose of showing that circumstances could have existed which would have rendered it proper to issue the patent to the railroad company. And it is submitted that the patent carries the presumption that such circumstances did exist.

It is the uniform ruling of the interior department that the making of a homestead entry upon other land by one who has filed a declaratory statement operates as a relinquishment of all rights under the filing.

Neilson vs. Railroad Co., 9 *L. D.*, 402.

The same conclusion is reached by the Supreme Court of Wisconsin in *Sanborn vs. Knight*, 75 *N. W. Rep.*, 1009;

Amacker vs. Northern Pacific R. R. Co., 58 *Fed. Rep.*, 850.

III.

It is submitted further that even if the land in question was excepted from the grant to the Northern Pacific Railroad Company, the patent conveyed the legal title and concludes the rights of the parties in an action at law. By his answer the defendant set up certain facts upon which he based the claim that the patent was issued under a mistake of law, and the answer concludes with a prayer that the patent be canceled. (Transcript, p. 24.)

There can be no doubt, under the decisions of this court, that if the patent is voidable merely and not void, it conveys the legal title and is not subject to collateral attack in an action at law.

In Gibson vs. Choteau, 13 Wall. 92, 102, the court said, Mr. Justice Field delivering the opinion:

"In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in the action of ejectment in the federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title."

And the court said in *Steel vs. Smelting Co.* 106 *U. S.* 447, 452:

"It is among the elementary principles of the law that in actions of ejectment the legal title must prevail. The patent of the United States passes that title. Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce. However great these may be, they constitute no defense in an action at law based upon the patent. That instrument must first be got out of the way, or its enforcement enjoined, before others having mere equitable rights can gain or hold possession of the lands it covers. This is so well established, so completely embedded in the law of ejectment, that no one ought to be misled by any argument to the contrary."

Mr. Justice Grier, speaking for the court in *Greer vs. Mezes*, 24 *Howard*, 268, 277, said:

"The hybrid mixture of civil and common law pleadings introduced by the state codes cannot be transplanted into the court of the United States."

It follows, then, that unless the patent issued to the plaintiff was absolutely void it concludes the rights of the parties to this action, and the legal title conveyed by it must prevail.

The question is clearly one of the jurisdiction of the officers of the land department, who assumed to act in determining whether the particular tract of land in question passed to the railroad company under its grant.

The precise question here presented was considered by the circuit court of appeals for the Eighth Circuit in a most carefully considered opinion in the case of *United States vs. Winona & St. Peter Rail-*

road Company, 67 *Fed. Rep.*, 948. That was a suit in equity brought by the United States to cancel certifications of land made to the state of Minnesota for the benefit of the defendant company under its land grant. The lands so certified were within the place limits of the grant and upon the definite location of the road were covered by *unexpired* declaratory statements. After the filings had expired, but while they were still of record and not formally canceled, the certifications were made. Admitting that the lands were in fact excepted from the grant for the reason that they were subject to claims when the road was definitely located, the inquiry of the court was directed to the question whether the certifications were absolutely void or whether they passed the legal title and were voidable merely.

After a careful consideration of the authorities, the court deduces the following propositions:

"(1). A patent or certificate of the land department to land, over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land, the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which the acts of congress have made no provision, is of this character.

"*Polk vs. Wendal*, 9 *Cranch*, 87, and cases cited under it, *supra*.

"(2). A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, under the acts of congress, is impregnable to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate.

"*Minter vs. Crommelin*, 18 *How.*, 87-89 and cases cited under it, *supra*.

"(3). A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law."

And the court continues:

"It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the court course of it is right or wrong.

"*Foltz vs. Railway Co.*, 8 *C. C. A.*, 635, 60 *Fed.* 316, 318, and cases cited.

"When these certificates were issued the Winona Railroad Company had undoubtedly applied to the land department for conveyances of the lands in controversy to the state for its beiefit. These lands were a part of the public lands of the United States, the disposition of which had been intrusted to that department by the acts of congress which established it and defined the powers and duties of its officers. Moreover, the acts of congress under which the Winona company claimed these lands expressly provided, as we have seen, that the secretary of the interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to 'indicate' the lands granted by certificates or patents to the state. In no other way could they have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of the railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made and finally the legal effect of all these all other material facts upon the claim of the railroad company to receive the lands under the acts of congress. It now appears that they were mistaken as to the legal effect of these facts, but the question they decided was one which the acts of congress authorized and required them to decide,—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void. They are impregnable to collateral attack, and they conveyed the legal title to the lands to the state and its grantees."

This case came on appeal to this court, but the question of the void or voidable character of the certifications was not directly passed upon.

United States vs. Winona & St. Peter R. Co., 165 *U. S.* 463.

The presumption always and necessarily exists that the officer issuing a patent had jurisdiction so to do.

Smelting Co. vs. Kemp, 104 *U. S.*, 646.
Polk's Lessees vs. Wendell, 5 *Wheat.*, 304.
Bank of U. S. vs. Dandridge, 12 *Wheat.*, 69-70.
Bagnell vs. Broderick, 13 *Pet.*, 450.
Field vs. Seabury, 19 *How.*, 323, 332.
Hughes vs. U. S., 4 *Wall.*, 232, 236.
Jackson vs. Lawton, 10 *John*, 213.
Delassus vs. U. S., 9 *Peters*, 134.
Minter vs. Crommelin, 18 *How.*, 87, 88.
Clements vs. Macheboeuf, 92 *U. S.*, 425.
Maxwell Land Grant Case., 121 *U. S.*, 379-382.
Colorado Coal Co. vs. U. S., 123 *U. S.*, 316, *et seq.*
Jackson vs. Cole, 4 *Cowen*, 596-7.
U. S. vs. Budd, 144 *U. S.*, 154, 161, *et seq.*

We submit that the judgment of the court below should be reversed.

C. W. BUNN AND
JAMES B. KERR,
Counsel for Plaintiff in Error.